IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

No. 99-35609

_____

AT&T CORPORATION et al.,
Appellants,

v.

CITY OF PORTLAND et al.,
Appellees.

_____

AMICUS CURIAE BRIEF OF CITIZENS' UTILITY BOARD OF OREGON, CONSUMER ACTION, CONSUMER FEDERATION OF AMERICA, THE UTILITY REFORM NETWORK ("TURN") AND UTILITY CONSUMERS' ACTION NETWORK

Andrew Jay Schwartzman, Esq.
Cheryl A. Leanza, Esq.
Harold Feld, Esq.
Media Access Project
1707 L. Street, N.W., Suite 400
Washington, DC 20035
Tel: (202) 232-4300

Jason Eisdorfer, Esq.
Citizens' Utility Board of Oregon
921 S.W. Morrison, #511
Portland, OR 97205

Bruce J. Wecker, Esq.
Furth, Fahrner & Mason
201 Sansome Street, Suite 1000
San Francisco, CA 94104
Tel: (415) 433-2070

Thomas J. Long, Esq.
The Utility Reform Network
711 Van Ness Avenue
San Francisco, CA 94102
Tel: (415) 929-8876

Charles Carbone
Utility Consumers' Action Network
1717 Kettner Blvd., Ste. 105
San Diego, CA 92101

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INTRODUCTION

Citizens' Utility Board of Oregon, Consumer Action, Consumer Federation of America, The Utility Reform Network ("TURN"), and Utility Consumers' Action Network (collectively "Consumer Amici") respectfully file this amicus curiae brief supporting affirmance of the District Court opinion. Consumer Amici are advocacy groups who represent the interests of consumers in obtaining unfettered and affordable access to the diverse sources of information available through the Internet. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing this brief.

Consumer Amici are long established consumer advocacy groups that appear regularly before federal, state and municipal legislative and administrative bodies, including the Federal Communications Commission ("FCC") and local franchising bodies. Their members include *consumers* interested in promoting competitive for Internet access, and *citizens* who have begun to utilize the enormous promise of the Internet to provide instantaneous access to noncommercial and governmental information, to communicate with others throughout the world, and to participate in democratic discourse as both speakers and listeners.

Vigorous competition among providers of broadband access to the Internet benefits consumers in two ways. Truly competitive markets yield lower prices, higher quality of service, and increased innovation. Competition also promotes the First Amendment's objective of a diverse flow of ideas and opinions. In this brief, Consumer Amici demonstrate that the Portland ordinance promotes both the First Amendment and economic interests of citizens and consumers.

First, by way of factual background, Consumer Amici show that, contrary to the assertions of AT&T Corporation ("AT&T"), the closed access model of AT&T

does not promote free speech, but rather has the ability to significantly dampen the Internet's potential for unfettered communications. Absent open access, AT&T would likely be able to force consumers to accept its closed system. Consumer Amici demonstrate that the broadband Internet access market is not likely to be effectively competitive and that consumer interests in free speech and choice would suffer if local governments were deprived of the power to mandate open access.

By way of legal argument, Consumer Amici address points not thoroughly discussed by other participants in this litigation. With respect to the First Amendment, Consumer Amici demonstrate that Portland's open access requirement does not implicate any protected speech right of AT&T, but does promote the *public's* paramount right to free expression and to receive information from diverse sources. With respect to preemption, Consumer Amici show that, in light of the ambiguous legal status of cable modem services, Congress has not manifested any clear intention to strip local governments of their authority to ensure that cable operators use the public rights-of-way in a manner that serves the public interest.

PRELIMINARY STATEMENT

A. Characteristics Of Today's Internet

The Internet is "open, decentralized and competitive":

> Companies...can develop and distribute innovative applications that spur usage, without owning any network infrastructure. Service providers must continually offer better pricing, services and support to win users' business. (Kevin Werbach, "The Architecture of Internet 2.0," *Release 1.0* (Feb. 19, 1999) at 1). (http://www.edventure.com/release1/ cable.html ("Werbach")

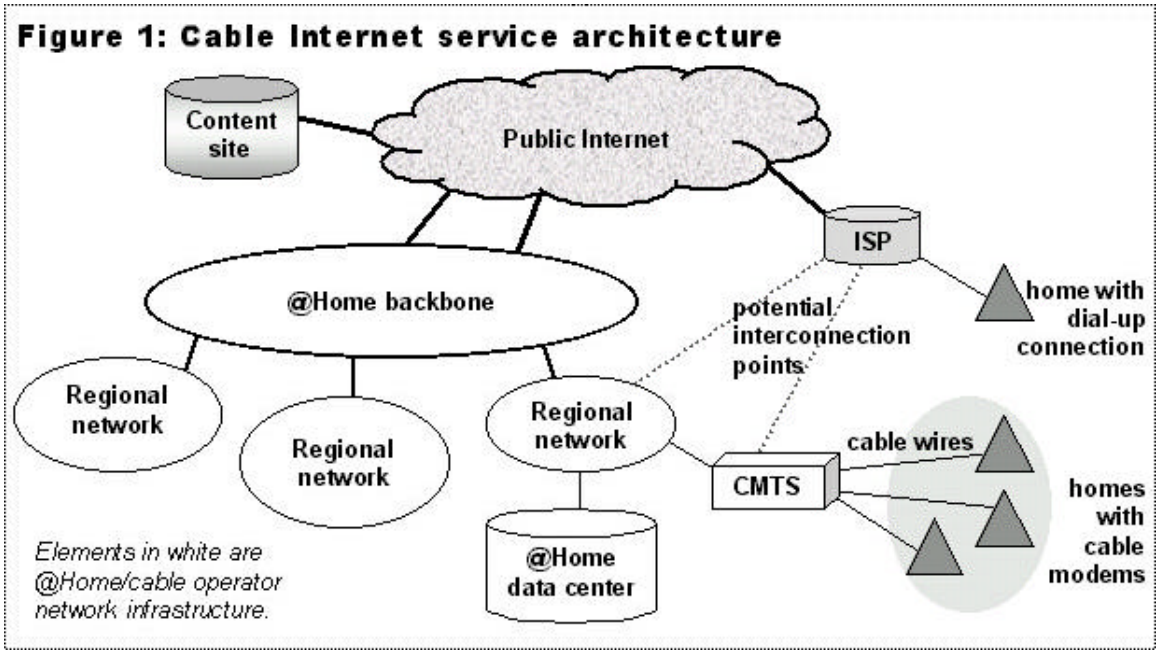
As one influential Internet observer has noted: "We take it for granted that IP networks are open, but that's not preordained," *Id.* at 2. Openness is a matter of design choice, not technological imperative. The Internet's signal characteristic has been open entry. That openness lowers entry barriers and facilitates instant market access. Entrepreneurs with a computer and an idea can start a business. Those seeking to disseminate messages can reach potential audiences far larger than any other mass medium can deliver. This network of networks also creates communities of common concern, locally and internationally.

1. "One Click" To Inferior Service On @Home's Controlled "Parallel Internet"

Despite AT&T's assurances of "one click" pass-through, users of the @Home service cannot speak or receive information with the same quality of service if they attempt to communicate with providers who have not contracted to become one of @Home's "preferred" providers. A user connecting through the @Home server may be able to connect with any location on the Internet, but not at the same speed. The user can opt to have another provider's "home page," but it will download significantly more slowly and embedded hypertext links will not appear as quickly as "preferred" content on the @Home "home page."

Absent open access, subscribers will have no means to avoid this discrimination against disfavored content. @Home seeks to have all data from other content providers come *via* its own proprietary Internet "backbone connection" and through servers it administers, where content can be prioritized behind that of AT&T's financial "partners." As Dr. John Malone, TCI's CEO, has said, unaffiliated ISP's "have to go through us." Auletta, *How the AT&T Deal Will Help John Malone Get Into Your House*, The New Yorker, July 13, 1998, at 13.

This diagram, from Werbach at 2, shows why:



The dotted lines indicate two "potential interconnection points" where AT&T has refused to allow competing ISP's to interconnect to its systems. Without those connections, users can reach other ISP's only through @Home's proprietary backbone.

@Home delivers data through a specially created *private* system and describes its closed "end to end" connection between a user and @Home's

backbone, as a "parallel Internet." @Home Br. at 8. @Home has more accurately described its network as "effectively one of the world's largest intranets," using a term which describes an entirely closed system typically used by companies for internal business.[1]

2. "The Trouble With This Vision Is That It's Not The Internet..."

AT&T's closed model for @Home service "differ[s] in important ways from dial-up Internet service providers (ISPs)." *Id.* at 4. It uses the same Internet Protocol ("IP") technology as telephone companies, but without non-discrimination safeguards imposed on competitors. Referring to At Home Corporation ("@Home"), Werbach states "In effect, @Home is a closed network that runs on the IP protocol and interfaces with the public Internet." *Id.* at 4. As Werbach concludes, "The trouble with this vision is that it is not the Internet...." *Id.* at 5.

There is simply no way to obtain the same level of freedom of expression and the same speed and quality of service in the closed model. Whatever the virtues of @Home's admittedly sophisticated technology, it is *not* being deployed as a "technology of freedom." *See* de Sola Pool, *Technologies of Freedom*, (Harvard University Press 1984).

3. Crimping And Caching

The impact of this architecture on competition and information flow cannot be overstated. It permits cable operators to favor their "partners" subtly, without actually having to block competitors' offerings.

> Cable operators aren't filtering URL's to prevent customers from reaching content sites. The problem is that they could...and users

[1] The passage quoted in the text was accessed on or about June 8, 1998 at http://www.home.net/corp/advantage/network.html (accessed on or about June 8, 1998), but appears to have been deleted.

> would have no alternative. The cable operators wouldn't even have to be so blunt, because their caching architecture allows some sites to receive better treatment than others. (Werbach at 6).

Without non-discrimination protections, legitimate and necessary bandwidth management techniques can be used for less benign purposes, including nearly undetectable content control. Excerpts from sales brochures directed at cable operators illuminate how subscribers' ability to receive and distribute information can be restricted. Cisco Systems, the leading Internet hardware supplier, advises cable operators that it can use Quality of Service ("QoS") controls to:

> restrict the incoming push broadcasts [from competitors] as well as subscribers' outgoing access to the push information site to discourage its use. At the same time, you could promote and offer your own or partner's services with full-speed features to encourage adoption of your services, while increasing network efficiency. (*Controlling Your Network - A Must for Cable Operators*, Cisco Systems, 1999 at 5("Cisco").)[2]

As the title suggests, Cisco bluntly explains that its technology can "isolate network traffic by the type of application, even down to specific brands, by the interface used, by the user type and individual user identification, or by the site address." *Id.* Cisco's documents confirm that cable companies can "crimp the hose" of a cable data stream based on whether content—or technology—is viewed as competitive to their own, or their "partners". For example, QoS controls can restrict download speed of video from non-preferred sources to generate low quality, jerky images compared to a partner's full-action video. Files using a competitor's new, more efficient software protocol for sending video can be identified and delivered at a slower speed, perhaps for pre-textual reasons.

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[2] The significance of these presentations is explained in a letter that some of Consumer Amici sent to the FCC Chairman. *See* http://www.cme.org/kennard.html.

Another mechanism for content discrimination is selective "caching." Caching is a technically benign storage function. Network speed is increased by storing data in "servers" located in close proximity to the user. Frequently accessed content appears on customers' computer screens much faster than content retrieved from distant servers reached through the Internet. @Home correctly states that "[l]ocal caching reduces backbone network traffic, enabling the @Home broadband network to overcome a fundamental weakness of the Internet's duplicative data transfers." @Home Br. at 10. This essential technology is, however, susceptible to discrimination. As Cisco explains to its customers, "you could specify that video coming from internal servers receives precedence and broader bandwidth over video source from external servers." Cisco at 5.

> @Home's closed network caches all of its own content as a matter of course.
>
> [B]ecause @Home caches content locally, its own content will have better apparent bandwidth than that of third party content providers. Because @Home makes money through advertising and commerce partnerships, the company has little incentive to provide higher-speed connectivity to outside content. (Werbach at 4).

Selective misuse of caching puts small e-commerce entrepreneurs and Internet publishers at a decisive disadvantage in seeking to challenge established competitors who can afford to purchase "preferred" or "exclusive" positioning from the cable ISP. Users, who will not necessarily understand why certain providers' content arrives much more quickly, will inevitably tend to choose those vendors and publishers.

4. Closed Access Impedes FreeNets And Server-Based Filtering

Two examples show how the AT&T@Home architecture is antithetical to the Internet's structure.

FreeNets - Hundreds of community "FreeNets" provide "access to information to everyone in the community."[3] However, FreeNets will likely depend on open access to broadband platforms for their survival.

FreeNets are not merely competing low-cost ISP's; some of their offerings are unlikely to be, or cannot be, duplicated by any commercial provider. FreeNets often offer information services—particularly of local interest - without "banner advertising" and offers of merchandise. Just as many citizens, especially parents, may prefer non-commercial radio or television to commercial offerings, they may prefer to access—or have their children access—local information sources that do not come bundled with ads providing "click through" access to merchandise.

AT&T or other cable operators therefore may have strong incentives to discriminate against or refuse service to FreeNets. Even if AT&T were willing to offer such services itself, these services would be subject to AT&T's corporate caprice. Furthermore, organizations or businesses hosted by AT&T without the protection of an open access provision could be forced to censor themselves or refrain from directly competing with services offered by AT&T, out of fear of losing their access to its network.

Server-Based Filtering. Closed access systems deny parents' choice to use "server-based" filtering,[4] a technology which may prove to be the most effective

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[3] *See* "The Case For Community Networking," http://www.opn.org/en/ index.html; "What Is A Community Network," http://www.opn.org/en/ what_is.html; "Birth of a New Medium," http://www.opn.org/en/ birth.html; and "Association For Community Networking," http://ben.boulder.co.us/afen/en/definition.html.

[4] Server-based filtering occurs on a server; a site is blocked before it gets to the user's computer. *See* http://www.cleaninter.net/faq.htm.

mechanism to control what material is available to their children on the Internet.[5] Development of such devices can promote free speech by protecting children while permitting the Internet to provide unfiltered access for those who wish to receive constitutionally protected material that is offensive to others.[6]

While @Home might offer its own software filtering option, this would not provide the same degree of security as a server that does not let targeted material through for any customer.[7] Dotsave.com, one of the increasing number of server-based filtered ISP's, each of which varies in taste and philosophy, explains that "[f]iltering is done at our servers, making it difficult, if not impossible, for even the most advanced computer user to 'hack' through...." http://www.dotsave.com/faq.html. Even if @Home offered a choice of content filters to reflect different tastes, it could not match the range of offerings which the free market might produce.

B. State Of Competition For Broadband Access Services

In a truly competitive market, the ability of AT&T's closed system to restrict the public's use of the Internet might not be cause for concern. If there were a menu of options for broadband Internet access, consumers could shun AT&T. However, this is not the current—or likely future—state of the market.

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[5] The Supreme Court contemplated the evolution of such parental control mechanisms. *See Reno v. ACLU*, 531 U.S. 844, 872 (1997).

[6] Consumer Amici would not support mandatory use of any content filtering technology. *See Mainstream Loudon v. Loudon County Public Library*, 24 F.Supp.2d 552 (E.D. Va. 1998).

[7] *See* "Safe Surfing for Web-wary families," *USA Today*, August 18, 1999 at 6D); "Small ISP filters out pornography, hate sites," *Chicago Tribune*, July 22, 1999, http://www.chicagotribune.com/smallbusiness/article/ 0.2669.2-319950.FF.html; "Mayberry brings small-town values to Net," *USA Today*, May 4, 1999, http://www.usatoday.com/life/cyber/tech/ ctf070.htm.

Portland concluded that competition would be reduced or eliminated in the market for Internet access if the transfer of control of Tele-Communications, Inc.'s ("TCI") cable franchise to AT&T were approved without a condition requiring open access to the "cable modem platform." In light of the historic role that local franchising bodies play in ensuring that the public's property is used in a non-discriminatory and competitively neutral fashion, this was a policy judgment that was well within the jurisdiction of the City to make. Indeed, as the FCC has itself recently recognized in its *Inquiry Concerning the Deployment of Advanced Telecommunication*[8] *("Advanced Services Report")*, ¶45, "[t]he last mile to the residential consumer, historically served by telephone and cable television incumbents, has generally been the least competitive and most bandwidth-constrained part of the communications network. … These factors, among others, have combined to make entry against telephone and cable incumbents very difficult."

AT&T questions Portland's policy judgment on two grounds, neither of which is persuasive.

Competition from Non-cable Providers. AT&T argues that narrow-band access through analog modems will be sufficient for most customers for years to come. Relying on the FCC's *Advanced Services Report*, it asserts that the "preconditions for monopoly" in high-speed on-line services and transport are absent. However, two fundamental flaws in the FCC's analysis make it clear that it was quite reasonable for Portland to have concluded otherwise.

First, the FCC's conclusion was merely a generalized observation based on broad investment patterns among potential competitors for nationwide broadband

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[8] 14 F.C.C.Rcd 2398, ¶¶45-6, 85-101 (1999).

access business. The FCC conducted no analysis to determine the actual availability of service within any particular geographical market. Indeed, despite the FCC's heavy reliance on an asserted rapid deployment of digital subscriber lines ("DSL"), the agency recognized that anywhere from 20% to 40% of the local exchange carriers' local loops are not capable of being upgraded to provide DSL. See *Advanced Services Report*, ¶46. The majority of the loops that cannot be upgraded lie in the residential and rural communities[9] that AT&T's @Home service will target and constitute the prime constituency that the open access requirement is designed to protect.

Second, the FCC's assertion that other technologies are competitive was based entirely on consideration of the bandwidths currently advertised. On this basis, the FCC perceived a slight advantage for the cable facilities, but ignored the possibility of a huge advantage developing in the future. For example, the FCC cited the 1.5 to 3.0 Mbps downstream rates that cable operators are currently advertising, as compared with 1.5 Mbps that Asymmetrical DSL can achieve. But cable is capable of far greater speeds. In the future, AT&T and @Home can be expected to increase the speed both through more efficient use of a single channel and by devoting more bandwidth to their service. The FCC recognized that, technically, speeds can reach 27 Mbps if merely one 6MHz channel were devoted to the service. *Advanced Services Report*, Appendix A at p. 2. Moreover, far more than a single channel will likely be devoted to Internet access, particularly as customer-selected video services provided over the Internet may supplant the traditional programming choices made by cable operators. Each television transmission cable can support

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[9] Homes served must generally be within 18,000 feet of the telephone company's central office to qualify for xDSL service. *Advanced Services Report*,

tens of channels; some support over one hundred channels. Indeed, TCI has announced plans to upgrade its major metropolitan systems to 750MHz and its other metropolitan and suburban systems to 550MHz. *TCI 1997 Annual Report*.[10] The FCC recently recognized that competitive pressures may require systems to expand their capacity to 150 or more channels. *Fifth Annual Report in the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Dkt. 98-102, ¶19 (Dec. 23, 1998). Thus, the speeds obtainable by cable access may outstrip those provided over copper wire pairs in the future, providing cable operators with a long-term advantage in providing access service. Although one must be cautious in predicting future trends in the highly innovative area of telecommunications technology, a local franchising body reasonably could have substantial concerns regarding the competitive environment for Internet access both in the short-run and in the long run.

Impact of TCI Merger. AT&T asserts that the TCI merger does not affect these competitive concerns since AT&T is simply taking the place of TCI. However, a local governmental body reasonably could be concerned that increased concentration will reduce competition and consumer choice. AT&T is in the process of aggregating many cable properties throughout the nation. With the announcement of its merger with MediaOne, some 57% of the cable subscribers in the United States will be dealing either directly or indirectly with companies affiliated with AT&T. Such concentration confers increased market power on cable operators in the selection of ISPs for partnering relationships, such as those between cable operators and @Home or Time-Warner's affiliated ISP, Roadrunner.

Appendix A, p. 2.

[10] Found at http://www.tci.com/tci.com/annualreports/ reportsframe.html.

Indeed, similar concerns formed the basis for certain amendments to the ownership restriction provisions contained in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). The Act directed the FCC to promulgate rules regarding horizontal ownership to help ensure that "no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer" and that "cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems." 47 U.S.C. §533(f)(2)(A) & (B).

ARGUMENT

A. Open Access Promotes First Amendment Rights Of Citizens And Consumers In Ensuring A Free And Open Internet

As others have persuasively argued, AT&T asserts no First Amendment-protected right to speak.[11] Actually, the "right" it asserts is more truly an effort to trample protected rights and interests of consumers and citizens to receive and disseminate information. Portland's ordinance furthers a long-standing history of legitimate governmental efforts to promote democracy and civic discourse by facilitating access to diverse sources of information. Even if AT&T had a valid speech right, any infringements should not receive strict, or even intermediate, scrutiny, because AT&T's proposed closed system would alter the characteristics of Internet access sufficiently to render previous constitutional analysis of Internet inapplicable. Consumer Amici wish to elaborate on certain of the First Amendment issues presented here from the perspective of the general public.

1. AT&T's Asserted Speech "Right" Is Actually The Suppression Of Citizens' Expression Interests

Despite cloaking itself in victim's garb, AT&T actually seeks the right to *suppress* speech. Not only does AT&T assert no valid First Amendment of its own, but it seeks the ability to trample the First Amendment rights of consumers and citizens. These individuals' and publishers' rights as speakers and users of the Internet were afforded the highest degree of First Amendment protection in *Reno v. ACLU*, 521 U.S. 844 (1997) ("*Reno*"). Portland's openness requirement *expands*

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[11] Consumer Amici endorse the First Amendment analysis of Appellee Portland and Intervenor-Appellee ORISPA. AT&T has presented no cognizable free speech claim to this Court. ORISPA Br. at 22-24; Portland Br. at 49-51. Consumer Amici further agree that any rights AT&T asserts would assuredly withstand any level of constitutional scrutiny this Court might apply. Portland Br. at 54-56.

access to speech, thus promoting First Amendment values, without interfering with AT&T's own service offerings.

As discussed above, AT&T has the capacity and the incentive to block or degrade access to disfavored speech,[12] including that of competing providers, such as that offered by organizations similar to Consumer Amici. It would prove very difficult for either the site's management or users to discover—let alone prove—that AT&T had actively interfered.

2. Portland Properly Promoted Its Interest In Expanding Civic Discourse

ISPs and publishers are justifiably concerned that AT&T will discriminate against them, to the point of denying them access to customers, at any price. In seeking to advance the First Amendment rights of its citizens, Portland has, in fact, chosen the least restrictive and most narrowly tailored solution. Allowing citizens a choice of ISP provides ***more*** freedom to AT&T than any other measure Portland could employ to promote source and speech diversity. Rather than impose hands-on content control, the Ordinances employ the judicially approved mechanism of content-neutral ownership limits. *See, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

AT&T seeks, through its cable franchise, to occupy the public rights of way. Such a franchise gives the operator enormous economic advantages. As a basic principle, cities that grant franchises should be able to ensure that the grant is not used to the detriment of the public. Cities have long been allowed to prevent the leveraging of facilities located on public property into the creation of a private

[12] For example, a Washington, D.C. consumer group operates a comparison service for long distance rates at http://www.trac.org/ webpricer/index.html which might rank AT&T's long distance rates unfavorably.

monopoly inimical to the public interest. Such jurisdiction should clearly extend to regulations to prevent a private monopoly over speech.

As new technologies supplant existing means of mass communications, policymakers and the judiciary must confront competing First Amendment interests. However, the First Amendment goals remain unchanged. The Supreme Court has repeatedly ratified government efforts to promote First Amendment values by insuring the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). It has held that "the people as a whole retain their interest in free speech...and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 389 (1969).

The government's obligation to protect the marketplace of ideas when threatened by private interests was first articulated by no less a figure than James Madison, who regarded deliberative debate as a necessary element of democracy. *See* Cass R. Sunstein, Democracy and the Problem of Free Speech at xvii (1993); William J. Brennan, Jr. "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1, 14-16 (1965). As the Supreme Court has said, "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("*Turner I*").

These principles are not new to the cable industry. The ownership and mandatory program access provisions of the 1984 & 1992 Acts promote diversity of

speech as well. 47 U.S.C. §§531-532, 548.[13] As the Senate Report for that legislation concluded:

> [a]s Oliver Wendell Holmes recognized 70 years ago, competition and First Amendment values are closely linked. … The Committee believes the First Amendment implies an affirmative role for the government to encourage a diversity of voices. In some instances, the First Amendment requires the government to ensure that there will be free competition of ideas and voices. (S.Rep. No. 102-93, at 511.)

3. The AT&T@Home Service Offering Does Not Share The Open And Diverse Characteristics Of The Internet; Therefore, It Does Not Deserve The Same Level Of First Amendment Protection

Citing *Reno* and *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) AT&T argues that the Portland ordinance deserves strict scrutiny. AT&T at 5; *see also* NCTA Br. at 43. As Consumer Amici explain above, AT&T asserts no valid speech interest here. Even if AT&T did assert such an interest, however, it falls far short of demonstrating that strict scrutiny is applicable, and, as Portland suggests, does not even merit intermediate scrutiny. Portland Br. at 54-56.

First Amendment standards of review depend upon the characteristics of the medium over which speech occurs. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (citing *Turner I*) (cable television); *Red Lion v. FCC*, (broadcasting); and *Sable Communications v. FCC*, 492 U.S. 115 (1989) (pre-recorded audio telephone messages)). The unique characteristics of Internet access as offered by AT&T and @Home preclude consideration under the standard enunciated in *Reno*.

@Home's "parallel Internet" has little in common with the Internet described in *Reno. See, id.* at 871-72 (describing a service in which any user may transmit or

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[13] A much more direct protection against discrimination by cable operators is contained in the "equal time" provisions which promote public access to information by requiring cable systems to sell television advertising to candidates at reduced rates and prohibit discrimination in rates and conditions. 47 U.S.C. §315(c)(2).

receive information without limitation); Berman & Weitzner, *Abundance and User Control*, 104 Yale L.J. 1619 (1995). Its closed, monitored and self-serving content selection more nearly resembles the privately controlled system that the Supreme Court afforded lesser protection in *Turner I*. There, the Court distinguished cable operators from newspaper publishers because cable operators can preclude viewers from seeing certain programming, whereas print publishers cannot prevent individuals from purchasing alternative print media. *Turner I*, 512 U.S. at 565. The Court concluded: "[t]he potential for abuse of this private power over a central avenue of communication cannot be overlooked." *Id.*; *see also* S. Rep. No. 102-93 at 50 (1991) (making a similar distinction between cable operators and print publishers in support of the constitutionality of the 1992 Act).

Absent the Portland ordinance, two key characteristics of the Internet—the unlimited ability to disseminate information and a user's ability to determine the source from which they receive information—are compromised. This difference leaves open to question which First Amendment standard should appropriately be applied to the service offered by AT&T and @Home. *See* Berman & Weitzner, 105 Yale L.J. at 1621.

To receive broader First Amendment protection, AT&T must operate its system as part of the Internet, not as a "parallel" closed system.

B. Federal Law Does Not Preempt A Local Government Body's Authority To Require Open Access

The lower Court accurately set forth the standards in determining an express preemption claim: "If Congress wants a statute to preempt a power traditionally held by states or local governments, Congress must make its intent 'unmistakably clear' in the statute's wording." 43 F.Supp.2d at 1152. AT&T does not dispute that principle; instead, it attempts to argue that Portland's open access provision is

prohibited by the clear language of The Cable Communications Policy Act of 1984 ("1984 Act") and the amendments to the Communications Act passed in 1996. That attempt fails because, the specific sections relied upon are far from facially clear, and become even more ambiguous when considered in the context of the present controversy. As demonstrated below, three of the four provisions on which AT&T relies, take on very different meanings depending upon whether one characterizes the Internet access service at issue as a "cable service," a "telecommunications service," an "information service," a combination of these services, or, none of the above.

The FCC's brief lays out in detail the fundamental ambiguities present in the definition of the services at issue here. Likewise, in its *Advanced Services Report*, the agency recognized that "some facilities and services may not be 'telecommunications' within the precise terms of the Communications Act or 1934, as amended, but may as a practical matter be competitive with advanced telecommunications capability. One such service is broadband provided over cable television systems" 14 F.C.C. Rcd 2398 at ¶24.

The fact of the matter is that Congress has not addressed the issue of open cable access to the Internet. It didn't do so in 1984 when some of provisions relied upon by AT&T were written, and it didn't do so again in 1996 when the other provisions were enacted. With no direct expression of Congressional intent with respect to the issue raised on appeal, the Court should be loath to infer such intent from snippets of the Communications Act read out of context. The standard of "unmistakable clarity" is rightly a strict one in our union of sovereign governments. If AT&T believes that preemption is appropriate, it can lobby Congress and attempt to obtain a clear statement on the subject.

1. The Application Of Section 541(b)(3)(D) To Portland's Open Access Provision Is Not Clear And, Thus, Cannot Preempt The Portland Ordinance

Section 541(b)(3) was added to the cable communications provisions of the Communications Act in 1996 ("1996 Act") as part of Congress' effort to prevent local franchising authorities from expanding their cable franchising jurisdiction under Title VI of the Communications Act of 1934 to cover telecommunications services. There are at least two reasons that this provision's applicability here is in substantial doubt, both of which doom AT&T's argument for preemption.

To begin with, the application of this section depends on whether the access service AT&T is being ordered to supply is a telecommunications facility or service. As the FCC's brief notes, this is not a question that can be readily answered.[14] AT&T itself has waffled on the characterization of the access that Portland has mandated in this litigation. In the lower court, it did not argue that Section 541(b)(3)(D) ("Plaintiffs' Supplemental Memorandum in Support of Their Motion for Partial Summary Judgment," p.19 (May 3, 1999)) (S.E.R. at 394-B)[15] preempted the Ordinance. Rather it argued that Congress sharply defined distinct regulatory categories for cable operators and telecommunications common carriers and that Internet access provided by cable operators fell on the cable operator side of that demarcation. *Id.* pp. 10, 15.

Second, one must question whether the cited section ever contemplated the situation where the cable operator was freely offering its own affiliate a

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[14] Interestingly, if one were to accept AT&T's characterization of the access mandated by the Portland Ordinance as a "telecommunications" service, Section 541(b)(3)(A)(ii) provides that none of the provisions "of this subchapter" apply to that service, which would presumably include the preemption provision on which AT&T relies, as well as each of the three other specific provisions that it cites.

[15] Portland's Supplemental Excerpts of Record are cited as "S.E.R.__."

"telecommunications facility or service," but refusing to provide the same to unaffiliated companies. Indeed, the legislative history of this provision shows that Congress did not contemplate stripping local authorities of the ability to prevent such discrimination. "The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a non-discriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees." H. R. Rep. 104-458, at 180 (1996).

2. Section 544(e) Has No Application To Portland's Action In Mandating Open Access

By its terms, Section 544 (e) only concerns a local authority's actions to "prohibit, condition or restrict" a cable system's use of "subscriber equipment" and "transmission technologies." The FCC, whose interpretations of technical terms in the Communications Act are owed substantial deference, has specifically concluded that the term "transmission technology" refers to "transmission medium, i.e., microwave, satellite, coaxial cable, twisted copper telephone lines, and fiber optic systems, and specific modulation or communications format, i.e., analog or digital communications." *Implementation of the Cable Reform Provisions of the Telecommunications Act of 1996*, 14 F.C.C.Rcd. 5296, ¶141 (March 29, 1999). Nothing in the record demonstrates that the Portland Ordinance will have any impact at all on AT&T's choice of "transmission technologies" as defined by the FCC. The FCC's *Approval Order*, upon which AT&T relies, discusses modifications to the Cable Modem Termination System ("CMTS") and issues such as, "router/proxy servers," "cable headends" and "capacity engineering, fault recovery, number assignment, customer provisioning and other operational matters." *Consent to the Transfer of Control of Licenses and Section 214 Authorizations for Tele-*

Communications, Inc., Transferor to AT&T Corp., Transferee, 14 F.C.C. Rcd 3160, ¶¶87-88 (1999). None of these issues have anything to do with AT&T's choices concerning the use of analog or digital signaling or its choices regarding whether to use fiber optics, coaxial or any other transmission technologies.

3. The Application Of Section 541(c) To Portland's Open Access Provision Is Not Clear And, Thus, Cannot Preempt The Portland Ordinance

AT&T's argument concerning Section 541(c) collapses as soon as one recognizes the ambiguities in the definitions on which it relies. Nothing in this provision prevents a local governmental body from subjecting a cable system to regulation as a common carrier if the service it provides is not a "cable service." Once again, it is far from clear that AT&T's role in the provision of @Home service should be characterized as a "cable service." See FCC's Brief at 12-13.

The legislative history shows that the use of the language "by reason of providing any cable service" was of critical importance to Congress: "A cable system would not, for instance, be subject to … the traditional common carrier requirement of servicing all customers indifferently upon request (except as otherwise provided in Title VI), *to the extent the cable system is providing cable services.*" H.R.Rep. No. 98-549, 60 (1984) (emphasis added) ("*1984 House Report*"). Although the characterization of @Home service as a "cable service" is, thus, crucial to AT&T's argument, its effort to show that it is such a service is entirely insufficient. On this point, AT&T simply recites the definitions contained in the statute and a House Report discussing an amendment which added two words to one of those definitions. AT&T Br. at 8. Careful reading of those definitions, however, makes it abundantly clear that at least some of the many services that are

bundled together in @Home's Internet access and online service do not fit within the definition of "cable service."

"Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. §522(6). AT&T appears to assert that @Home service is an "other programming service," i.e. "information that a cable operator makes available to all subscribers generally." Clearly, however, much of the information @Home supplies as part of its service will not be made available to "all subscribers generally." For example, @Home service includes three e-mail accounts and, through access to the Internet, subscribers will be able to do personal banking or shopping, make both local and long distance phone calls, and have access to secure "intranets," such as their workplace computer networks.

The legislative history is equally clear that many of the services that are a part of @Home service are decidedly not "cable services." Among the services that Congress specifically designated as "non-cable" services were "electronic mail" and "all voice communications." 1984 House Report at 44. Congress clearly opted for the general distinctions described by the FCC in its amicus brief. Cable service is akin to broadcasting where information is chosen by one and broadcast to many (or "all" in the language of the statute). The 1996 Act did not change the definition of "other programming service."[16] In sum, Section 541(c) does not clearly apply to the Portland Ordinance because @Home service is not clearly a "cable service."

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[16] AT&T's argument that the 1996 Act "made explicit that 'interactive' online services" are cable services (AT&T Br.at 8), is unsupported by the House Report it cites. That reports makes clear that Congress was merely seeking to update the language of the cable service definition -- by adding the words "or use" – to reflect

4. The Application Of Section 544(f)(1) To Portland's Open Access Provision Is Not Clear And, Thus, Cannot Preempt

Section 544(f)(1) by its terms concerns the provision and content of "cable services". But AT&T itself has sought to characterize the access it would provide to unaffiliated ISPs as a "telecommunications service", not a "cable service". Once again, in light of this fundamental definitional ambiguity, preemption can not be found since Congress's intent to preempt is not "unmistakably clear."

Moreover, Section 544(f)(1) expressly excepts from its terms requirements imposed according to the express terms of the cable provisions of the Communications Act, as amended. As discussed above, one of those terms is contained in Section 544 itself, which provides that local franchising bodies "may enforce any requirements contained within the franchise … for broad categories of video programming or other services." 47 U.S.C.§ 544(b)(2). Thus, even if provision of access to independent ISPs were considered a cable service, Portland's open access requirement permissibly requires provision of a "broad categor[y] of programming or other services." 47 U.S.C.§ 544(b)(2).[17]

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the "evolution of *video programming* toward interactive services." H.R.Rep. No. 104-458 at 167 (1996). No one in this proceeding asserts that interactive online services are "video programming." Indeed, AT&T took exactly the opposite position in the court below. "Memorandum in Support of Motion by Plaintiffs for Partial Summary Judgment," pp. 22-23 (Feb. 25, 1999). Thus, "other programming service" remains restricted to "information" made available to "all subscribers generally."

[17] This provision has been construed to permit local franchising bodies to require cable operators to provide categories of programming, such as programming originating from within the franchise area or from a particular geographical area. *Chicago Cable Communications Co. v. Chicago Cable Comm'n*, 678 F.Supp. 734 (N.D.Ill.1988), aff'd 879 F.2d 1540 (7th Cir.1989); *Jones Intercable v. Stevens Point*, 729 F.Supp. 642 (W.D.Wis.1990).

5. Other Provisions Of The Communications Act, As Amended, Show That Congress Intended To Preserve For Local Governments Substantial Authority Over Cable Franchise Decision-Making

The breadth of the authority of local entities to ensure that cable operators serve local needs and interests is apparent from another provision of the Communications Act, not addressed by other parties. The 1992 Act added language to the general franchise provisions confirming the franchising authorities' ability to review the operator's "financial, technical and legal qualifications" in making franchise selection determinations. The language added was similar to that previously contained in the renewal provision adopted in the 1984 Act. *Id.* §541(a)(4).[18] AT&T concedes that Portland had authority to review its qualifications in its consideration of the transfer at issue here, but disputes the scope of this authority. Contrary to AT&T's interpretation, this language appears to permit a franchising authority broad discretion in selecting among potential cable operators those most able to meet the community's needs.

Among the issues that the franchising authority could consider on renewal are the operator's "financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal," and whether "the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." *Id.* §§ 546(c)(1)(A) - (D). With respect to the latter issue, the local franchising

[18] Although Section 546 is inapplicable to AT&T's request for approval of a franchise transfer and the language used in the renewal sections was not entirely duplicated in Section 541, the similarity in language may help the Court interpret the Congressional intent in adopting the provisions that are at issue here. The differences in language were necessary to reflect the procedural requirements of hearings and submissions of a "proposal to renew" which are inapplicable to the initial grant of a franchise or to a franchise transfer.

authorities' identification of "cable-related needs and interests" is a legislative act which is entitled to substantial deference in the courts. Union CATV, Inc. v. City of Sturgis, 107 F.3d 434, 441 (6th Cir. 1997) ("Congress made clear that the Act 'preserve[s] the critical role of municipal governments in the franchise process' … [t]he Cable Act recognizes that municipalities are best able to determine a community's cable-related needs and interests. The city council's knowledge of the community gives it an institutional advantage in identifying the community's cable needs and interests. It would be inappropriate for a federal court to second-guess the city in its identification of such needs and interests."). Thus, it is clear that a local franchising authorities' review of the cable operator's "qualifications" includes its plan to meet the legislatively identified "cable-related needs and interests" of the community. [19]

[19] Consumer Amici join in the arguments of other parties and amici that Section 533(b) and other provisions of the Communications Act show Congress' broad recognition of local franchising authority in the cable operator selection process.

CONCLUSION

For all these reasons, the District Court's Judgment should be affirmed.

Dated: September 14, 1999.

Respectfully submitted,

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Bruce J. Wecker, Esq.
Attorneys for Consumer Amici

Andrew Jay Schwartzman, Esq.
Cheryl A. Leanza, Esq.
Harold Feld, Esq.
Media Access Project
1707 L. Street, N.W., Suite 400
Washington, DC 20035
Tel: (202) 232-4300

Bruce J. Wecker, Esq.
Furth, Fahrner & Mason
201 Sansome Street, Suite 1000
San Francisco, CA 94104
Tel: (415) 433-2070

Thomas J. Long, Esq.
The Utility Reform Network
711 Van Ness Avenue
San Francisco, CA 94102
Tel: (415) 929-8876

Jason Eisdorfer, Esq.
Citizens' Utility Board of Oregon
921 S.W. Morrison, #511
Portland, OR 97205

Charles Carbone
Utility Consumers' Action Network
1717 Kettner Blvd., Ste. 105
San Diego, CA 92101

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 14, 1999, I filed the fifteen copies of AMICUS CURIAE BRIEF OF CITIZENS' UTILITY BOARD OF OREGON, CONSUMER ACTION, CONSUMER FEDERATION OF AMERICA, THE UTILITY REFORM NETWORK ("TURN") AND UTILITY CONSUMERS' ACTION NETWORK with the Office of the Clerk, U.S. Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco CA 94103-1526, via hand delivery on said day.

I further certify that on September 14, 1999, I served true copies of said documents via Federal Express overnight courier upon:

David W. Carpenter
Sidley & Austin
One First National Plaza
2 South Dearborn Street
Chicago, IL 60603

Jayne C. Lee
Deputy City Attorney
Office Of The City Attorney
City Hall, Room 234
San Francisco, CA 94102

Jacob M Lewis
Appellate Staff
Civil Division, Room 9134
Department Of Justice
601 D Street N.W.
Washington, DC 20530

Brett Kavanaugh
Kirkland & Ellis
655 15th Street NW
Washington, DC 20025

Nory Miller
Jenner & Block
601 13th Street NW
Washington, DC 20005

Paul Mogin
Williams & Connolly
725 Twelfth Street NW
Washington, DC 20005

William Richardson
Wilmer, Cutler & Pickering
2445 M Street NW
Washington, DC 20037-1420

Christopher Wolf
Proskauer Rose LLP
Suite 800
1233 Twentieth Street NW
Washington, DC 20036

Bruce D Sokler
Mintz, Levin, Cohn, Ferris
Glovsky And Popeo, PC
Suite 900
701 Pennsylvania Avenue NW
Washington, DC 20004

Howard J. Symons
Mintz, Levin, Cohn, Ferris
Glovsky And Popeo, P.C.
Suite 900
701 Pennsylvania Avenue NW
Washington, DC 20004

Paul T. Fortino
Perkins Coie LLP
1121 S.W. 5th Avenue, Suite 1500
Portland, OR 94204

Duane A. Bosworth
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

Joseph Van Eaton
Miller & Eaton
1155 Connecticut Ave. N.W.
Suite 1000
Washington, DC 20036

_____

Bruce J. Wecker
Attorney for Consumer Amici